IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

Mat.Appeal.No. 133 of 2005()

OP(DIV) NO.91/2003 OF ADDL.DISTRICT COURT-I,MAVELIKKARA

APPELLANT:PETITIONER IN OP

KURUVILLA VARGHESE, AGED 43 YEARS,
S/O.P.V.KURUVILLA, KALEEKKAVADAKKETHIL HOUSE,
MANKAMKUZHY P.O., MAVELIKKARA-690 558.

BY ADV. SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS

RESPONDENT: COUNTER PETITIONER

SAPNAM ELIZEBETH JOSEPH, AGED 41 YEARS,
CHAKANAD HOUSE,. VIJO BHAVAN ROAD,
THRIKKAKARA, B.M.C. P.O., ERNAKULAM-682 021.

BY ADV. SRI.SAPNAM ELIZEBETH JOSEPH-PARTY IN PER

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 23/03/2007, THE COURT ON 25/05/2007 DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

MAT. APPEAL NO. 133 OF 2005 E

Dated this the 25th day of May, 2007

JUDGMENT

Sankaran, J.

The questions involved in this Matrimonial Appeal are: (1) Whether a petition for dissolution of marriage filed by the husband on the ground that the wife wilfully refused to consummate the marriage and the marriage has not therefore been consummated (which is a ground for dissolution of marriage under clause (vii) of Section 10 introduced by The Indian Divorce (Amendment) Act, 2001, Act 51 of 2001 by the substitution of Section 10 of The Divorce Act,1869) is liable to be dismissed on the ground that the Petition was filed twelve years after the marriage and therefore the petitioner is guilty of unreasonable delay in presenting the petition within the meaning of Section 14 of the Act, when the petition was

presented within reasonable time after the commencement of Act 51 of 2001? (2) Whether refusal by the wife to consummate the marriage on the ground that there is likelihood of her begetting children with mental disorder as the relatives of the husband have children with mental retardation, amounts to wilful refusal to consummate the marriage ?

2. The parties are Indian Christians. Their marriage was solemnized on 29-8-1991 at St. Mary's Malankara Syrian Catholic Church, Vettiyar. The husband was working as a Mechanical Engineer in H.M.T. Kalamassery at the time of marriage. After the wedding, for three days, the parties stayed at Bharat Tourist Home, Ernakulam. According to the husband, the wife did not co-operate for sexual union during those days and thereafter. According to him, he took a sympathetic attitude towards his wife since he had lost her father before the

marriage. The husband secured a job in Saudi Arabia in 1995 and he left India. According to the husband, he used to talk to the wife over phone. He even purchased a Maruti 800 car and gifted to his wife. All the needs of the wife were satisfied by him, at the request of the wife. At the request of the wife's people, the F.D. receipts in the name of the wife were returned by the husband. In spite of his such attitude towards his wife, she did not co-operate and the marriage was never consummated. The mother of the husband committed suicide on 25.6.2003. He came back to India. In spite of this tragic event, the wife remained unchanged. It is stated in the petition as follows:

> "Hence even though the petitioner and the counter petitioner acted as husband and wife before the public more than a decade, their marriage had not come into effect either due to the physical or mental inability of the counter petitioner or due to the reluctancy of the counter petitioner towards the petitioner. Hence she is to be treated as impotent suffering either complete impotency or relative impotency. On the above ground the petitioner is entitled to nullify the marriage with the counter petitioner. If she is not in any way impotent she is playing utmost mental cruelty to the petitioner. Hence the petitioner is either entitled for a decree

> to nullify the marriage on the ground of impotency or for a decree of divorce on the ground of cruelty."

3. The respondent-wife in her counter stated that she hails from a highly educated and academically well placed Syrian Catholic family. It is stated that on 1-9-1991, that is, on the 4th day of marriage, they went to the house of the Appellant at Mavelikkara. As regards non consummation of marriage, we would prefer to quote what the wife said in the counter, which reads as follows:

> "During the visit, the respondent found that one child in every house of the petitioner's father's side was mentally retarded. The respondent was shocked and shattered because the petitioner hails from such a mentally retarded family background. Hence the respondent decided then and there itself that she will not bear a child from the petitioner because the child will be a carrier of 'mentally retarded gene'."

4. As regards the incidents after her visit to Mavelikkara on 1-9-1991, the respondent stated in the counter thus:

> "Respondent along with her brothers went to the Apartment of the petitioner and told him that the respondent is willing to nullify the marriage because she is not willing to bear a child from the petitioner because of the mentally retarded family background. Respondent demanded to return the fixed deposit receipts which was handed over to the petitioner on the day of the betrothal. After a couple of days the petitioner returned the fixed deposit receipts to the respondent and requested to the respondent not to nullify the marriage because he will breakdown because of disgrace which he has to face from colleagues and relatives. The petitioner further told the respondent to act his wife's role to the public. The respondent took pity on the petitioner and agreed. Petitioner and respondent did not share the same bedroom and not once also the petitioner forced the respondent to start a family."

5. The respondent- wife contended that she had to waste twelve years of her 'prime life' by agreeing to the request made by the husband to her to act the role of his wife. She further stated that the husband was bidding for time to settle his family affairs. He has settled all his brothers well in life and now he wants a divorce. The respondent also contended that the petition is not a bonafide one and that it is highly belated. The respondent asserted that she is not impotent. She also denied the case of cruelty.

6. Before us, the respondent- wife argued the case herself, without the assistance of a counsel. She argued the case efficiently, in fluent English. She is educated and is fully aware of the court proceedings and the nuances of litigation. Since she appeared in person, we had heard the case in greater detail and we had also occasion to ascertain whether she is willing to consummate the marriage at least at this belated stage. She expressed her unwillingness for the same. The position is thus clear that the state of affairs as between the parties continue to be the same as before.

7. Even though the husband prayed for nullifying the marriage on the ground of impotency of the wife, that ground was not pressed by him before the court below. Reliefs were confined to dissolution of the marriage on the ground of cruelty and on the ground of non consummation of

marriage due to the wilful conduct of the wife. It is to be noted that though no specific relief was made in the Petition on the ground under clause (vii) of Section 10 of the Divorce Act, both the parties understood the case of each other on the facts pleaded which would justify a ground under clause (vii). Evidence was adduced and arguments were advanced before the court below by the parties treating the case as one under clause (vii) of Section 10. The court below also considered the case accordingly. Therefore, we also consider the case as coming under clause (vii) of Section 10 as well.

8. It is an admitted case that the marriage was not consummated. The court below dismissed the Petition on the following grounds: (a) Within six days of the marriage, the brothers of the wife demanded the fixed deposit receipts from the petitioner; (b) The parties "lived as husband and

wife for the outside world for more than 12 years without having any sexual intercourse with each other; (c) The wife agreed to act the role of the wife at the request of the husband; (d) No notice was issued by the husband before filing the Petition; (e) It cannot be said that the wife willfully refused to consummate the marriage; (f) The wife had a valid reason for non consummation of marriage; (g) The husband himself is a privy to the conduct of the wife and therefore he is not entitled to get a decree for divorce; (h) There is a delay of twelve years for filing the Petition; and (g) The conduct of the husband is such that he himself co-operated with the wife for non consummation of the marriage.

9. The Indian Divorce Act, 1869 is an Act to amend the law relating to Divorce and Matrimonial Causes. By the Indian Divorce (Amendment) Act, 2001, the nomenclature of the Act has been changed

as "The Divorce Act, 1869". The Preamble of the Act reads thus: "Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial; it is hereby enacted as follows." Cardinal changes were brought about in the Act by the Indian Divorce (Amendment) Act, 2001. Section 10 of the Act, before the Amendment Act of 2001, was as follows:

" **10**. **When husband may petition for dissolution**.- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution.- Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

Or has been guilty of incestuous adultery,
Or of bigamy with adultery,
Or of marriage with another woman with adultery,
Or of rape, sodomy or bestiality,
Or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a *mesna et toro*,

Or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition.- Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded."

10. Section 10 of the Act was substituted by the Amendment Act, 2001. Section 10, after the amendment, reads as follows:

"10. Grounds for dissolution of marriage.-

(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."

11. On a comparison of Section 10 of the Act before the Amendment and after the amendment by the Amendment Act, 2001, it is clear that after the amendment, more grounds are now available for divorce and that the rigor of the grounds for dissolution is less now. Wilful refusal to consummate the marriage was not a ground available before the substitution of Section 10 by the Amendment Act of 2001. The appellant- husband could not have preferred a petition for dissolution of marriage before 3-10-2001, the date of commencement of Act 51 of 2001, on that ground. Therefore, the

appellant cannot be blamed for not filing a petition for divorce on the ground of non consummation of marriage before that date. The appellant was employed abroad. He came to India on getting intimation that his mother committed suicide on 25-6-2003. The petition for dissolution was filed on 22-7-2003.

12. The proviso to Section 14 of the Act provides that the court shall not be bound to pronounce a decree declaring the marriage to be dissolved "if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting" the petition. **In Ramakrishna Pillai V. Vijayakumari Amma: 1989(2) K.L.T. 188,** interpreting the words "there has not been any unnecessary or improper delay in instituting the proceedings" occurring in Section 23 (1) (d) of the Hindu Marriage Act, it was held thus:

"It is necessary to consider the aspect of unreasonable or improper delay in view of the fact that according to the trial court there has been such delay on the part of the husband in approaching the court. We notice that such delay is not an absolute but only discretionary bar under the English Law and the Indian Divorce Act 1869. But under S. 23(1) (d) of the Hindu Marriage Act it is an absolute bar. Where there is delay petitioner has to come forward with the explanation for the delay and satisfy the court that the explanation is reasonable. Then and then only the court can hold that the delay is not unnecessary or improper. At the same time it is not any and every delay which will be of consequence. The basis of the rule is that delay is a material factor because if unexplained it may lead to the inference that there was collusion between the parties, or acquiescence in the injury of indifference to the same or some wrong motive for seeking relief after slumbering over the matter in sufficient comfort for an inordinate period after the ground for relief had arisen."

13. The appellant could not seek for dissolution of marriage on the ground of wilful refusal to consummate the marriage before the date of commencement of Act 51 of 2001. At that time, he was employed abroad. Within one month of his arrival in India, he filed the petition for dissolution of marriage. There was no unreasonable delay on the part of the appellant. Moreover, refusal to consummate the marriage constitutes a continuing, recurring and ever present state of affairs. The grievance of the husband continues to

exist and is not solely based on a remote past event. Hence the court below was not justified in refusing the relief on the ground that the petition was filed belatedly.

14. The next question to be considered is whether there was wilful refusal to consummate the marriage, on the part of the wife. The case of the wife is that within one week of the wedding, she decided that she would not bear a child from the petitioner. Immediately thereafter, the respondent wife and her brother visited the appellant and demanded to return the fixed deposit receipts. It is stated in the counter that the respondent made it clear to the appellant that she would not bear a child of the appellant. The case of the appellant-husband is that the respondent wilfully refused to consummate the marriage. The court below found that the marriage was not consummated due to the refusal by the wife; but it was held that she had a

valid reason for the same. The respondent filed proof affidavit in lieu of chief examination in evidence. Before the cross examination, she wanted to narrate her case before court and it was recorded. It reads thus:

> "But I want to narrate my case in short. Twelve years ago, the moment I realized that the petitioner belonged to a mentally retarded family background, I requested the petitioner to nullifying the marriage. Since I was not willing to bear his children because though the petitioner may appear to be a physically healthy person, in his chromosomal make up, he was a carrier of mentally retarded gene. Then the petitioner broke down and said to me that he would end his life because he cannot face the disgrace of nullifying the marriage at his house front and work front and requested me to be his wife only in public and save the marriage. Out of fear and compassion, I agreed to stay in marriage and be his wife only in public. I told that I will not bear his children. Now after 12 years, the petitioner is asking for a divorce because I am not willing to bear his children which I had made it clear with the petitioner twelve years back. Twelve years of my precious life has been wasted. If he had agreed to nullify the marriage within 6 days of marriage, my folk would have got me married within six months. Since the petitioner wanted me to stay in marriage I agreed. Now when he decided to call off the marriage, he expects me to agree for that also. All time, every time and any time, man expects to be the winner."

15. As regards sexual intercourse, the wife stated in evidence thus:

> "Is it correct to say that it was due to your reluctance that the marriage

> was not consummated ? (Q). Since duly the genetic problem of mental retardation in family of the petitioner, I have taken a decision not have sexual intercourse with the petitioner and beget his children (A). Even now I am first prepared to have sexual intercourse with the petitioner for the reason stated above." (the word 'first' is evidently a mistake. It must be 'not'. We are saying so since the respondent stated before us that she is not prepared to have sexual intercourse with the appellant).

16. The respondent also stated in evidence that there was no attempt to get the opinion of a doctor to rule out the possibility of begetting any child with mental retardation. We quote her own words: "on the basis of my observation in the family members of the petitioner, I formed an opinion that he is also carrier of mentally retarded genes." The only bodily relationship between the parties, according to the husband, was a permission to kiss when he presented a Maruti car to the wife. The wife denied in evidence even this act on her part. According to the respondent, the paternal uncle's son and the paternal aunt's son of the appellant are mentally retarded. The respondent stated in evidence that on her query,

the appellant disclosed that the son of another paternal aunt is also mentally retarded. The suggestion by the appellant in the cross examination of the respondent is that only the son of his paternal uncle is suffering from mental retardation. There is no independent evidence on this disputed question and the court below has not arrived at any finding on this aspect, either.

17. There is no scientific data available before court to come to the conclusion that the appellant-husband carries gene responsible for begetting children with mental retardation. There was no attempt to adduce any medical evidence. The appellant was not subjected to any sort of medical examination before the respondent jumped to the opinion that he carries genes causing genetic disorders in his children. An opinion formed by the wife, unsupported by any scientific or medical data, that the appellant is a carrier of such genes

is not a sufficient ground to non consummate the marriage.

18. What is 'wilful' refusal ? In **State of Orissa and others V. Md. Illiyas: A.I.R. 2006 S.C. 258,** the Supreme Court held thus:

> "At this juncture, it is desirable to consider the true import of the word 'wilful'. An act is said to be 'wilful' if it is intentional, conscious and deliberate. (See Rakapalli Raja Rama Gopala Rao V. Naragani Govinda Sehararao: 1989 (4) S.C.C. 255."

19. In Black's Law Dictionary, 6th Edition, at page 1599, 'willful' is defined thus:

> "Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.
>
> Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.
>
> An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced by its context.

> In civil actions, the word (willfully) often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with bad purpose; without justifiable excuse; stubbornly, obstinately, perversely."

20. In **Vinita Saxena V. Pankaj Pandit: 2006)3 S.C.C. 778= 2006 (2) K.L.T. 150**, the Supreme Court considered the question "marriage without sex" at paragraphs 41 to 49. It was held at paragraph 45, thus:

> "Spouses owe rights and duties each to the other and in their relationship they must act reasonably. In every case where cruelty exists it is possible to say that the spouse at fault has been unreasonable. The list of cruelty, therefore, should be breach of the duty to act reasonably, whether in omission or commission, causing injury to health. Such a list avoids imputing an intention where in fact none may exist. Further all such matters are foresight, desires, wishes, intention, motives, perception, obtuseness, persistence and indifference would remain relevant but merely as a matter of evidence bearing upon the requirement to act reasonably or as aggravation of the matters charged."

21. The Supreme Court quoted with approval the decision of the Delhi High Court in Rita **Nijhawan V. Balkrishan Nijhawan: A.I.R. 1973 Delhi 200**, wherein it was held: "Marriage without sex is an anathema. Sex is

the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long."

22. In **A V. B, (1996 (1) K.L.T. 275**, it was held by a learned Single Judge of this court that refusal on the part of the husband to indulge in normal sexual intercourse amounts to cruelty. In **Prem Prakash V. Sarla: A.I.R. 1989 M.P. 326**, the Special Bench of the Madhya Pradesh High Court held:

> "Sex plays important role in matrimonial life and cannot be separated from other factors leading to a successful married life. Therefore, conduct of husband or wife which renders the continuance of cohabitation and performance of conjugal duties impossible amounts to such cruelty."

23. In **Smt. Shakuntala Kumari V. Om Prakash Ghai: A.I.R. 1981 Delhi 53**, it was held:

> "A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But wilful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married."

24. We are of the view that the respondent was not justified in denying sex to the appellant on the opinion formed by her that the appellant carries genes capable of inheritance to the children causing mental retardation. The appellant produced before us a copy of a material on "Genetic causes of mental retardation", which reads as follows:

> "What is genetics?
>
> Genetics is "the science that studies the principles and mechanics of heredity, or the means by which traits are passed from parents to offspring" (Glanze, 1996). Through genetics a number of specific disorders have been identified as being genetically caused. One example is fragile X syndrome, a common genetic cause of mental retardation, which is caused by the presence of a single non-working gene (called the FMR- 1 gene) on a child's X chromosome.
>
> How are genetic disorders inherited ?
>
> Genetic disorders can be inherited in much the same way a person can inherit other characteristics such as eye and hair color, height and intelligence. Children inherit genetic or hereditary information by obtaining genes from each parent. There are three common types or modes of inheritance: dominant, recessive and X- linked (or sex-linked).
>
> Dominant inheritance occurs when one parent has a dominant, disease-

> causing gene which causes abnormalities even if coupled with a healthy gene from the other parent. Dominant inheritance means that each child has a 50 percent chance of inheriting the disease-causing gene.
>
> Recessive inheritance occurs when both parents carry a disease-causing gene but outwardly show no signs of disease. Parents of children with recessive conditions are called "carriers" since each parent carries one copy of a disease gene. They show no symptoms of having a disease gene and remain unaware of having the gene until having an affected child. When parents who are carriers give birth, each child has a 25 percent chance of inheriting both disease genes and being affected. Each child also has a 25 percent chance of inheriting two healthy genes and not being affected, and a 50 percent chance of being a carrier of the disorder, like their parents."

25. The wife did not make any application before the court below for a chromosomal study to establish that the appellant is a carrier of the disease causing genes. There is no case for her that the appellant's father or mother or their children (including the appellant) has any mental disorder. Even assuming her case to be true that the children of the paternal uncle and aunts of the appellant have mental disorder, that is not a sufficient ground to conclude that the appellant is a carrier of the gene causing mental disorder in

his children. If opinion, unsupported by scientific data is taken as relevant, the most acceptable opinion would be to rule out the possibility of the appellant carrying the offending gene since his parents and their children have no symptoms of mental disorder. A mere opinion of one's own, who is alleged to be guilty of wilful refusal to consummate the marriage, cannot be taken as a valid reason to hold that non consummation is not wilful. The irresistible conclusion is that the respondent-wife has willfully refused to consummate the marriage within the meaning of clause (vii) of sub section (1) of Section 10 of the Divorce Act, 1869.

For the aforesaid reasons, we allow the Appeal, set aside the judgment of the court below and allow the Petition for dissolution of marriage under clause (vii) of sub section (1) of Section 10 of the Divorce Act, 1869. A decree *nisi* is issued for

dissolution of marriage under Section 16 of the Divorce Act.

(KURIAN JOSEPH)
Judge

(K.T.SANKARAN)
Judge

ahz/

KURIAN JOSEPH&
K.T.SANKARAN, JJ.

MAT.APPEAL NO. 133 OF 2005

JUDGMENT

25th May, 2007